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In the Supreme Court of the United States

OCTOBER TERM, 1982

WEST COAST MEDIA, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Communications Commission properly denied a renewal application for a radio station because the licensee failed to make reasonable and good faith efforts to broadcast non-entertainment programming and because its programming was not responsive to the needs and interests of the listening community.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 695 F.2d 617. The decision of the Federal Communications Commission (Pet. App. 46a-68a) is reported at 79 F.C.C.2d 610. The opinion and order of the Commission denying reconsideration (Pet. App. 69a-79a) is reported at 86 F.C.C.2d 331. The initial decision of the administrative law judge (Pet. App. 13a-45a) is reported at 79 F.C.C.2d 625.

JURISDICTION

The judgment of the court of appeals (Pet. App. 101a-102a) was entered on December 7, 1982. A petition for rehearing was denied on February 7, 1983 (Pet. App. 103a). The petition for a writ of certiorari was filed on May 9, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an Ohio corporation created by a group of businessmen with no prior experience in broadcasting for the purpose of acquiring FM radio stations in California. In May 1971, petitioner purchased radio station KDIG-FM, in San Diego, California (Pet. App. 15a-16a).[1] In December 1971, petitioner amended its renewal application for KDIG, which was then pending before the Commission. Citing financial losses as the reason for its amended application, petitioner proposed eliminating all news and other non-entertainment programming, except public affairs. Petitioner promised to devote at least 1.1% of its broadcast time to public affairs and further promised expressly that this programming would not be pre-produced tapes, but instead would consist of three, 5-minute programs per day, seven days a week, which would involve local investigation and behind-the-scenes reporting (*id.* at 48a & n.4).

On July 25, 1972, the Commission accepted the amended proposal (Pet. App. 58a n.25).[2] Beginning the next month, however, and continuing through April 1974—a period of more than one-half of the license term and ending just three months before the next renewal application was due to be filed—KDIG broadcast no public service programming whatever (*id.* at 57a).

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[1]During the relevant time period, petitioner was also the licensee of radio station KORJ in Orange, California (Pet. App. 15a).

[2]The Commission's staff in its letter to petitioner added that it expected KDIG to broadcast increased programs during the license term " 'consistent with [petitioner's] proposal' " (Pet. App. 49a). In this regard, the December 1971 amendment had stated further that it was petitioner's intention " 'well before the next license renewal time' " at both of its stations to devote " 'more than just an adequate or minimum of time to news, public affairs, religious and instructional types of programs * * *' " (*id.* at 48a; footnote omitted).

2. Petitioner filed an application for renewal of its KDIG license in July 1974 (Pet. App. 80a). On November 1, 1974, two residents of San Diego filed a petition to deny the application, largely on the ground that petitioner had failed to perform as it had promised in its 1971 renewal application (*id.* at 80a, 82a). The Commission set the renewal application for hearing on the following four issues: whether petitioner reasonably attempted to perform as promised with respect to its non-entertainment programming; whether its non-entertainment programming was responsive to the community's needs or interests; whether petitioner had violated the Commission's rules; and whether renewal of petitioner's license would serve the public interest (*id.* at 94a).

After a hearing, the administrative law judge ("ALJ") concluded that petitioner had "failed to operate fully in the public interest during the 1971-1974 license period" (Pet. App. 42a). The ALJ found that, contrary to its promise in 1971, petitioner had broadcast little or no news or public affairs during the bulk of the license period (*id.* at 24a-25a).[3] He also rejected petitioner's assertion that its programming deficiency should be excused because of financial difficulties. The ALJ pointed out that petitioner had failed to keep separate records regarding KDIG and therefore it was impossible to determine whether KDIG alone was responsible for the financial problems (*id.* at 25a). The ALJ also found that petitioner had been oblivious to the community's programming interests or needs and that petitioner had

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[3]The ALJ noted that it was impossible to make precise findings regarding petitioner's broadcast performance because the program logs for over one year had been misplaced and the logs for the rest of the period were often unreliable (Pet. App. 35a-36a). The ALJ held that although petitioner did have an obligation to keep accurate records, no independent decisional significance would be attached to petitioner's loss of the logs (*id.* at 41a-42a). The ALJ noted, however, that the absence of the logs weakened petitioner's submission with respect to its past performance.

committed a number of minor violations of the Commission's rules (*id.* at 26a-34a). Although the ALJ found that petitioner had not satisfied its obligation to perform in the public interest, he granted a one-year renewal because he concluded that the inadequate performance had been largely the product of petitioner's lack of broadcast experience and not a deliberate effort to avoid performing as promised (*id.* at 42a-43a).

3. The Commission adopted most of the ALJ's findings (Pet. App. 53a). It found a substantial discrepancy between petitioner's programming promises and its performance (*id.* at 57a). The Commission also found that petitioner failed to make a good faith effort to comply with its promises; petitioner had cut back staff and resources at KDIG so as to make compliance impossible (*id.* at 58a).[4] The Commission concluded that petitioner "made initial proposals * * * [that] it did not then intend to effect [and] that with the passage of time [petitioner] did not make sincere efforts to carry out its proposals" (*id.* at 64a).

The Commission also rejected petitioner's claim that its failure to perform as promised should be excused by the station's financial difficulties, finding that the evidence presented by petitioner supported an inference of "misallocation of resources, rather than a lack thereof" (Pet. App.

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[4]The Commission found further evidence of the licensee's lack of reasonable and good faith efforts to fulfill its commitments in the testimony of Donald McCann, a major investor in petitioner, to the effect that it was his initial intent to reduce KDIG's staff to one employee whose duties would include selling, programming the automation machines each day, servicing the background music, supervising the telephone service bureau and composing one news-public affairs program per day. The Commission concluded that this employee could not reasonably have been expected to have had the time to produce the daily 5-minute public affairs program that the licensee promised the Commission in December 1971 (Pet. App. 59a).

64a).[5] The Commission pointed out that "[t]he citizens of San Diego were ill-served by the deprivation of all public service programming while [petitioner] was devoting its resources and efforts to improving the market position of [its other radio station]" (*ibid.*). Finally, the Commission found that petitioner's lack of non-entertainment programming was also a dereliction of its duty to be responsive to the needs and interests of the community (*id.* at 66a).

Based on these adverse findings, the Commission rejected the ALJ's decision to grant petitioner a one-year renewal of its license. The Commission found that lack of experience was an inadequate excuse for petitioner's failure to attempt in good faith to comply with its broadcasting promises during virtually the entire period of its prior license (Pet. App. 64a). Accordingly, the Commission denied petitioner's application for renewal (*id.* at 68a).

On petition for reconsideration, the Commission rejected petitioner's claim that non-renewal had been improperly predicated on findings of misrepresentation, which had not been designated as an issue in the case. The Commission pointed out first that petitioner's good faith in attempting to comply with its broadcasting promises was set as an issue for hearing and thus petitioner should have been on notice that its general intentions with regard to the station would be an issue (Pet. App. 72a-78a). The Commission also made clear that its decision was based on petitioner's inadequate performance and not on any misrepresentations petitioner may have made (*id.* at 74a).

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[5]Noting that petitioner's financial showing commingled the revenues and expenses for both of its stations, the Commission pointed to the need for a "station-specific" showing particularly where, as in this case, there was evidence indicating a disparity in petitioner's allocation of resources in favor of its other station at the expense of KDIG (Pet. App. 62a-63a).

4. The court of appeals affirmed (Pet. App. 1a-12a). The court characterized as "imprudent" the Commission's reference to petitioner's intent in making its proposals, but found the matter harmless—no more than the logical conclusion to be derived from the "[w]ide discrepancies [that] existed between [petitioner's] proposals and its performance from the outset" (*id.* at 6a; footnote omitted). In addition, the court found it unnecessary to remand on this issue since the Commission on reconsideration had already made plain that its decision not to renew petitioner's license was based on performance and not on misrepresentations (*id.* at 7a). The court also held that the Commission's rejection of petitioner's financial hardship defense and its refusal to grant renewal were fully explained and consistent with the statutory public interest standard that the FCC is obliged to apply, 47 U.S.C. 309 (Pet. App. at 8a-11a). Finally, the court held that the Commission's finding that petitioner had failed to make a good faith effort to comply with its broadcasting promises was supported by substantial evidence (*id.* at 11a-12a).

ARGUMENT

1. Petitioner argues (Pet. 8-11) that the Commission failed to explain adequately why it denied the renewal application in this case since it had not previously denied a license renewal application solely because the licensee had failed to perform as promised.[6] The Commission, however,

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[6]Petitioner inaccurately characterizes (Pet. 3, 8-9) the Commission's decision as based exclusively on the issue of promise-versus-performance. The Commission also found that petitioner had failed completely in its non-entertainment programming to be responsive to the community's problems, needs and interests. Although the issues are intertwined, they involve distinct obligations imposed upon a licensee. The Commission did not reach the question whether its adverse conclusion on the responsiveness issue was, irrespective of the other issues in the case, an independent basis for denying renewal, but it did indicate that its decision rested on its conclusion that "[petitioner] failed to meet its burden of proof on *both* the promise versus performance *and* programming responsiveness issues" (Pet. App. 75a n.17; emphasis added).

fully explained its conclusion that renewal of petitioner's license was not in the "public interest"; this is all that was required. "[T]he Commission is [not] bound * * * to deal with all cases at all times as it has dealt with some that seem comparable." *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 228 (1946).

Petitioner's contention amounts to a claim that its license should be renewed, despite its egregious failure to honor its broadcasting promises, because it was not accused of affirmative misconduct. But the rule has long been that the incumbent licensee "must literally 'run on his record' " (*Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994, 1007 (D.C. Cir. 1966)), and if performance is wanting, as it clearly was here, then "[t]he licensee, having been given a chance and having failed, should be through." *Citizens Communications Center* v. *FCC*, 447 F.2d 1201, 1213 (D.C. Cir. 1971). These are the settled principles that the Commission applied in this case, and the court of appeals correctly held that they were properly applied to bar renewal of petitioner's license.

2. Petitioner argues (Pet. 11-14) that the decision below conflicts with the decision of the Fifth Circuit in *Steadman* v. *SEC*, 603 F.2d 1126, 1143 (1979), aff'd on other grounds, 450 U.S. 91 (1981), because the court here allowed the FCC to impose the "ultimate sanction"—nonrenewal of a license—without an explanation for why a lesser "sanction" would not suffice (Pet. 11-12), whereas the Fifth Circuit in *Steadman* remanded to the SEC for an explanation of why it had permanently barred an investment broker from practicing his trade. There is no conflict between the decisions.

The court of appeals explained (Pet. App. 10a) that the FCC's role in license renewals is not punitive and thus is readily distinguishable from the SEC's "debarment" function. In *Steadman*, one of the primary justifications offered

by the SEC for the severity of its sanction was to deter *other* brokers from engaging in such conduct. The court asked the SEC to explain why lesser sanctions would not equally well serve that deterrent purpose. 603 F.2d at 1142. Thus, the reason for the remand in *Steadman* is completely irrelevant to the bases for the Commission's decision in this case.

Moreover, the FCC fully explained why no lesser "sanction" was appropriate in this case; any lesser sanction would have allowed petitioner to continue broadcasting on KDIG. In light of petitioner's past performance and the Commission's finding that that performance was a reasonable basis for predicting what petitioner would do in the future (Pet. App. 65a), the Commission found that petitioner's continued operation would not be in the public interest. This finding fully supports the Commission's determination to deny even short term renewal of the license.

3. Finally, petitioner asserts (Pet. 14-18) once again that its renewal was denied because the Commission found it guilty of misrepresentation, even though that was not a designated issue. The Commission, however, expressly disavowed resting its decision on findings of misrepresentation (Pet. App. 74a, 75a n.17). The court of appeals accepted the Commission's explanation and correctly concluded that a remand would serve no purpose (*id.* at 7a). Petitioner had notice and a full opportunity to be heard on the dispositive issues, and, as the court below found, the Commission's grounds were sufficient to support its result. Accordingly, further review of this claim is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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